IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-548

EDWARD LEE MICHAEL, JR.,

Petitioner,

-vs-

FRANK A. EYMAN, Warden,
Arizona State Prison,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent accepts petitioner's Statement of the Case except as otherwise modified or expanded upon in each argument.

ARGUMENT

I

MAY THE STATE SUPPRESS THE SPOKEN RESPONSE TO THE QUESTION: "WHERE IS THE GUN?" ON ESCOBEDO GROUNDS AND YET USE IN EVIDENCE AT THE TRIAL THE GUN ITSELF, WHICH WAS IMMEDIATELY THEREAFTER AND IN ANSWER TO THE SAME QUESTION, DISPLAYED TO THE QUESTIONING POLICE IN ITS PLACE OF CONCEALMENT?

As the body of the deceased, Florence Michael, was being removed from the room by ambulance attendants, the defendant arose from the bed and started to follow; Officer Star grasped the defendant's right arm and asked "Where is the gun?" Defendant responded, "I shot my wife. Is she dead? Please help her." Again Officer Star asked where the gun was and the defendant responded, "It's over there," and pointed to the interior of the bedroom with his arm. The defendant's son, Timothy, who had entered the room, then opened the

desk drawer and said to the officer, "Here it is." Star looked into the drawer and identified a .22 caliber revolver and a .45 caliber automatic both enclosed in holsters.

It was held in State v. Michael, 103 Ariz. 46, 49-50, that the above spoken statement of petitioner was inadmissible in violation of the precepts of Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

Petitioner contends that the trial court should have excluded from evidence the gun used to commit the killing of petitioner's wife as such evidence fell within the purview of the fruit of the poisonous tree doctrine and had been "come at by exploitation of that illegality." Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

We believe that the search was reasonable as the officer had a right and duty to locate the weapon incident to the safety of himself and other persons present at the scene, as well as the obligation to preserve the evidence connected with the crime. McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153; Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782; Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576; A.R.S. §13-1415; State v. Michael, 483 P.2d 541, 107 Ariz. 126, 129 (1971).

The act of Timothy in opening the desk drawer was not prompted by any request or direction from the petitioner or from Officer Star. Timothy was acting as an independent source in his own right as a witness in disclosing the location of the

gun; therefore, the gun was not the type of evidence required to be suppressed under the Escobedo doctrine.

There is persuasive dicta in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The court said at 29 L.Ed.2d 595 that:

> Had Mrs. Coolidge, wholly, on her own initiative brought out her husband's gun and clothing and then taken them to the police station to be used as evidence against him, there can be no doubt under existing law that the articles would later have been admissible in evidence.

The court went on further to say that since there was not the slightest indication of an attempt by the police to coerce or dominate her action in obtaining the gun and clothing or to direct her actions by more subtle techniques of suggestion available to officials in circumstances like these, the seizure was valid. The court

further stated:

> To hold that the conduct of the police here was a search and seizure would be to hold, in effect, that a criminal suspect has constitutional protection against the adverse consequences of a spontaneous, good faith effort by his wife to clear him of suspicion.

Respondent submits that the petitioner does not have constitutional protection against the adverse consequences of a spontaneous, good faith effort by petitioner's son in responding to a question by a police officer directed to the father, where there wasn't any type of coercion involved in soliciting a reply or act from the son.

Timothy was not entitled to claim any constitutional privilege and was available to the officers for interrogation as to his knowledge of the events surrounding the death of petitioner's wife. Since Timothy

had put the gun in the desk drawer at the request of petitioner, such information certainly would have been provided to the officers during the course of the investigation.

Assuming, for the sake of argument, that the gun was obtained as the result of an unlawful search, such evidence would nevertheless have been admissible as such evidence inevitably would have been acquired even without the alleged unlawful action. In Wayne v. United States, 318 F.2d 205 (D.C., 1963), the Court stated at 318 F.2d at 209:

> The Supreme Court has recently had occasion to discuss and clarify this difficult doctrine. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). It stated that the exclusionary rule has no application when the government obtains evidence "from an independent source." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed.2d 319

(1920). The Court added that the question to be asked in applying the doctrine is "'whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." Wong Sun v. United States, supra, 371 U.S. at 488, 83 S.Ct. at 417.

* * * * *

It was inevitable that, even had the police not entered appellant's apartment at the time and in the manner they did, the coroner would sooner or later have been advised by the police of the information reported by the sister, would have obtained the body, and would have conducted the post mortem examination prescribed by law.

The gun would certainly have been discovered in the normal course of the investigation. In Lockridge v. Superior Court of Los Angeles County, 3 Cal.3d 166, 89 Cal. Rptr. 731, 474 P.2d 683, 686, cert. den.

402 U.S. 910, 28 L.Ed.2d 652, 91 S.Ct. 1387, the court said:

> Moreover, even if the witness was discovered as a result of illegal police conduct, his testimony is admissible if he would have been discovered in the normal course of a lawfully conducted investigation. (People v. Ditson (1962) 57 Cal.2d 415, 443-444, 20 Cal.Rptr. 165, 369 P.2d 714; Wayne v. United States (1963) 115 U.S.App.D.C. 234, 318 F.2d 205, 209; Somer v. United States (2d Cir. 1943) 138 F.2d 790, 792; cf. People v. Stoner, supra, 65 Cal.2d 595, 602-603, fn. 3, 55 Cal.Rptr. 897, 422 P.2d 585, see also R. Maguire, How to Unpoison the Fruit, The Fourth Amendment and the Exclusionary Rule (1964) 55 J.Crim.L., C. & P.S. 307, 314-317.)

Although the knowledge gained from Timothy's immediate response to the officer's question may have accelerated discovery of the weapon, it did not taint the evidence. Such evidence would have inevitably been discovered through further lawful investigations.

ARGUMENT

II

MUST THE UNITED STATES DISTRICT COURT HOLD AN EVIDENTIARY HEARING TO RESOLVE A MATERIAL AND DISPUTED QUESTION OF FACT?

Petitioner has not raised a question alleging the violation of a federal right appropriate for consideration by this Court.

The limited function of a federal court in reviewing the case of a State prisoner was defined in Sampsell v. People of the State of California, 191 F.2d 721, 725 (9th Cir., 1951) as follows:

> Our function in this type of proceeding is not to correct errors committed in a state trial court. * * * Federal courts must withhold interference with the administration of state criminal justice unless a federal right has been violated.

The subject instruction, even if given as transcribed does not raise a federal question. In Arizona, it has been held

that failure to object to an instruction, unless it constitutes fundamental error, waives consideration on appeal. State v. Brown, 104 Ariz. 510, 456 P.2d 368 (1969); State v. Norgard, 103 Ariz. 381, 442 P.2d 544 (1968)

In McDonald v. Sheriff of Palm Beach County, Florida, 422 F.2d 839 (5th Cir., 1970), the Court stated that alleged error pertaining to instructions to a jury does not constitute a basis for habeas corpus relief, unless the error is so gross as to result in violation of petitioner's constitutional rights. The case of Gomez v. Beto, 402 F.2d 766 (5th Cir., 1968), is determinative of the issue where the court held that error in state court instruction which if read out of context would appear to have been an instruction to find defendant guilty and which was not objected to at time of

trial was not so gross as to result in violation of defendant's constitutional rights.

The material and disputed issue of fact to be resolved was whether the complained of, erroneous jury instruction on malice aforethought was occasioned by error in transcription or an error in its deliverance by the trial judge.

Assuming arguendo, that the finding was adverse to the State, i.e., that the trial court did give an improper instruction, following the reasoning in Gomez v. Beto, supra, this would not present a federal question which is proper for review under a habeas corpus proceeding.

The reasoning of Richard C. Gormley, United States Magistrate, details the facts and cases deemed significant by the District Court, and reads in part as follows:

The other ground set forth is an allegation that an erroneous instruction was given by the court on malice. A copy of the transcript TR Vol. XI, page 176 is attached hereto. The Arizona Supreme Court found this to be an error in transcribing and not the actual instruction given. This was apparently based on a number of reasons. First, the instruction was so patently erroneous that it would have produced an immediate response from both prosecution and defense, a fact which did not happen. Secondly, no objection was made at the close of instructions. The court also noted the absence of an avowal by counsel that the instruction was given as reported. The TR Vol. X, Page 1 and 2 reflects the trial court stated it would give the first three paragraphs of MARJI 251. A copy of the transcript pages and instruction are attached hereto. The court apparently also gave weight to a presumption of regularity that what was indicated would be done, was in fact done and that the state trial judge knew the law and correctly stated it.

Read in context with all of the instructions and in the absence of objection by counsel this issue does not give rise to a constitutional question. Gomez

v. Beto, 402 F.2d 766, Cert Denied, 349 U.S. 936; McDonald v. Sheriff of Palm Beach County, Florida, 422 F.2d 839; Poulson v. Turner, 359 F.2d 588 (10C.A.1966); Linebarger v. State of Oklahoma, 404 F.2d 1092 (10C.A.1968).

It is felt that little could be accomplished by an evidentiary hearing in this matter. It is my recommendation that counsel be advised the court will consider the matter on the basis of the petition, the reported decision and objection thereto, Trial Transcript Vol. XI, Page 173-185, Vol. X, Page 1 and 2 and copy of MARJI Instruction 251. (The Magistrate's Recommendation and the Order of the United States District Court for the District of Arizona entered September 17, 1971.)

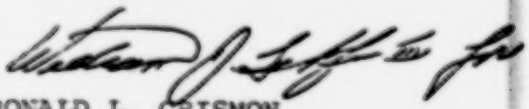
The opinions reprinted and reproduced as Appendix A, Appendix B and Appendix C in the Petition for Writ of Certionari appear to be correct.

CONCLUSION

Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

GARY K. NELSON
The Attorney General
of Arizona



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